85-876

No. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, CLERK

In The
Supreme Court of the United States
October Term, 1985

JON A. VICARS,
Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a municipal ordinance can constitutionally require (1) that an individual businessman remain in the business of providing rental housing and (2) that he provide the housing as a public service to specific persons designated for preferential treatment by the municipality.

2. Whether a municipal ordinance which requires the property owner to grant permanent uninvited access to his property to specific persons designated for preferential treatment by the municipality violates the Fifth and Fourteenth Amendment protections against the taking of property without just compensation.

PARTIES BELOW

Petitioner is an individual, Jon A. Vicars. Respondent is the Appellate Department of the Superior Court in and for the County of Alameda. The following ten individuals were the named defendants in the original complaint: Ross Eppler, Sue Blake, Peter Benson, Hillary J. Johnson, Julia Anne Cato, Susan Stone, Wendy Morris, Francisca Suzio, Mary Ann Bridget Lawley, and Brian C. Akers.

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v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

OPINIONS BELOW

The decision of the California Supreme Court denying review of the California Court of Appeal decision denying Vicars' writ of certiorari is unpublished, and is attached as Appendix A. The decision of the California Court of

Appeal denying petitioner's writ of certiorari is unpublished, and is attached as Appendix B. The decision of the Appellate Department of the Superior Court is unpublished, and is attached as Appendix C.

———o———

JURISDICTION

The decision of the Appellate Department of the Superior Court of Alameda County was filed and entered on February 21, 1985. The decision of the Court of Appeal was filed and entered July 8, 1985. The decision of the California Supreme Court denying review was filed August 28, 1985. This Court has jurisdiction pursuant to Section 1257(3) of Title 28 of the United States Code. In addition this Court has just recently agreed to review the case of *MacDonald, Sommer & Frates v. County of Yolo and City of Davis, prob. juris. noted*, 54 U.S.L.W. 3270 (Oct. 21, 1985) (No. 84-2015). This case would be a complementary companion case to *MacDonald* as it involves issues which are similar yet not identical. By granting certiorari to review this case the Court will be able to provide a more complete clarification of the murky area of the law relating to regulatory takings.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution: "[N]or shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

City of Berkeley Ordinance 5261-NS, Section 13, is set forth in Appendix H.

STATEMENT OF THE CASE

Petitioner, Jon A. Vicars, has owned since 1982 rental housing located in Berkeley, California, where rent control regulations are presently in effect. Appendix E-1. Vicars no longer wishes to remain in the rental housing business and in order to withdraw from this occupation he, of course, needed to remove his tenants. For this purpose he terminated the month-to-month tenancies of his renters. Appendix E-2. When the renters refused to vacate Vicars filed an unlawful detainer action in the Berkeley-Albany Municipal Court. Appendix E. Some of the tenants responded with demurrers. The demurrers were based on the argument that the Berkeley rent control ordinance did not allow evictions for the purpose of permitting Vicars to withdraw from the occupation of providing rental housing. Appendix D-3. Berkeley Ordinance 5261-NS, Section 13, designates tenants in occupancy of the property to have special protected rights to remain in the property over all other potential tenants, regardless of the interests of the property owner. *See* Appendix H. Arguments on the demurrers were heard on January 17, 1984. The demurrers

were sustained without leave to amend. Appendix D-2.[1] Vicars subsequently appealed to the Appellate Department of the Superior Court where he argued successfully that sustaining the demurrers violated his constitutional rights by requiring him to continue in the rental business against his wishes and forcing him unwillingly to provide access to his property for the housing of persons who had no contractual or property right to occupy the premises.

On October 18, 1984, the Appellate Department of the Superior Court remanded the case to the Municipal Court with instructions to set aside the order sustaining the tenants' demurrers. Appendix D-11. In the opinion of the Appellate Department of the Superior Court, the application of the Berkeley rent control ordinance violated Vicars' rights under the Fifth and Fourteenth Amendments to the United States Constitution. Appendix D-11. However, before the Municipal Court could hear the matter on remand, the tenants and amicus, City of Berkeley, petitioned for a rehearing in light of the California Supreme Court's decision in *Nash v. City of Santa Monica,* 37 Cal. 3d 97 (1984). The Appellate Department of the Superior Court upon reconsideration reversed its earlier decision and affirmed the order sustaining the tenants' demurrers without leave to amend. Appendix C. On January 31, 1985, Vicars filed an application for certification to the Court

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[1] Under California law a demurrer admits the truth of all factual allegations in the complaint. *Martinez v. Socoma Companies, Inc.,* 11 Cal. 3d 394, 399 (1974). As the Appellate Department of the Superior Court affirmed the demurrers, the facts set forth in the complaint must, for purposes of review, be taken as true. *Hoyem v. Manhattan Beach City School District,* 22 Cal. 3d 508, 517 (1978), *Commercial Standard Insurance Co. v. Bank of America,* 57 Cal. App. 3d 241, 246 (1976).

of Appeal with the Appellate Department of the Superior Court. Appendix F. Vicars argued that his circumstances varied significantly from those in *Nash* and involved constitutional considerations not considered in that case, but the application for certification was denied on February 21, 1985.

Vicars, left with no speedy and adequate remedy at law and no right to appeal,[2] filed a petition for certiorari with the California Supreme Court on April 22, 1985. The California Supreme Court transferred the petition to the California Court of Appeal, First Appellate District, which denied the petition on June 7, 1985. On June 14, 1985, a renewed petition for certiorari was filed. On June 21, 1985, the California Supreme Court again transferred the petition to the California Court of Appeal, First Appellate District. The Court of Appeal denied this petition on July 8, 1985. Appendix B. Vicars on July 18, 1985, petitioned the California Supreme Court for review of the Court of Appeal decision. On August 28, 1985, the California Supreme Court denied the petition for review. Appendix A.

The constitutional issues presented in this petition were raised in the appeal to the Appellate Department of the Superior Court and in the petitions to both the California District Court of Appeal and the California Supreme Court. The appellate courts declined to review

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[2] Under California procedure, an appeal from a decision of the Municipal Court is to the Appellate Department of the Superior Court. Cal. Rules of Court, Rule No. 121. Further review by a District Court of Appeal is discretionary. Cal. Rules of Court, Rule No. 62.

them and thereby affirmed demurrers to the complaint. Therefore, this case comes to this Court on the pleadings.

Although the court below did not expressly rule on the question of the availability of damages to Vicars, a claim under the Just Compensation Clause is properly before this Court. Under California law diminution in value of property due to the effect of a valid regulation of property is not compensable. *Agins v. City of Tiburon,* 24 Cal. 3d 266, 276-77 (1979), *aff'd on other grounds,* 447 U.S. 255 (1980). The facial validity of the ordinance in question was established by the California Supreme Court in *Fisher v. City of Berkeley,* 37 Cal. 3d 644 (1984), *prob. juris. noted,* 105 S. Ct. 2653 (May 28, 1985) (No. 84-1538). Therefore, the only remedy available to Vicars was a declaration that the Berkeley eviction for good cause ordinance was unconstitutional as applied to him. The Appellate Department of the Superior Court enforced the ordinance over petitioner's constitutional objections. The California Court of Appeal and Supreme Court by refusing to hear this case denied Vicars the only state remedy that he had. Vicars' constitutional claims are, therefore, properly raised before this Court.

REASONS FOR GRANTING CERTIORARI

This case presents on remarkably simple facts two major issues of federal law which have not been, but should be, settled by this Court. The courts below have ruled that Vicars is required to continue against his will to apply his time, abilities, energy, and resources to the provision

of municipally regulated rental housing. Vicars has asked for no more than to stop participating in an occupation which has become a form of public service and which he now finds to be financially unrewarding, repugnant to his personal principles, and damaging to his health and well-being. He has *not* asked for approval of a new use of the property involved. He has *not* asked to destroy or alter the physical nature of the property. He has *not* asked the municipality to approve any regulated action on his part. He simply decided for reasons both financial and personal to stop participating in the politically controlled housing market of the City of Berkeley and to withdraw his activities from the jurisdiction of a group of public officials whom he believed were abusing him. The tenants of Vicars' property, who had no contractual or property rights to remain on the premises, convinced the California courts to impose the Berkeley ordinance on Vicars in order to require him to continue to provide them with inexpensive housing accommodations. This Court has not decided the extent to which a government mandate can require that an individual against his will continue in an occupation for an unstated period of time.

This case also presents a question which is complementary to the issue accepted for review by this Court in *MacDonald, Sommer & Frates v. County of Yolo and City of Davis, supra.* Both cases present the issue of when a municipal regulation which significantly affects the use and enjoyment of property may be found to constitute a taking of property requiring payment of just compensation under the Fifth and Fourteenth Amendments. In *MacDonald* a taking may be found because the regulation prevents any viable economic use. In contrast in this case,

the taking may be found because the regulation requires one particular use to the exclusion of all others and that particular use requires the property owner to grant uninvited access onto the property by other persons.

Because Vicars was denied the opportunity to amend his pleading to plead the economic hardship imposed on him (*see* Appendix F-2), the question of loss of viable economic use exists in this case only in the tangential form of whether Vicars must be allowed the opportunity to plead a defense to the ordinance based on loss of such use. The issue squarely presented for consideration is whether a regulation which limits the only use of the property to one which requires an uninvited physical invasion by other persons constitutes a taking of the property. Because this issue complements the question presented in *MacDonald*, review of this case at the same time will enable this Court to address on a more comprehensive basis the need for uniformly accepted standards for determining when a level of regulation is constitutionally impermissible.

I

THIS COURT SHOULD CLARIFY THAT VICARS HAS A CONSTITUTIONALLY PROTECTED RIGHT TO WITHDRAW HIS PERSONAL TIME, ABILITIES, AND ENERGIES FROM THE OCCUPATION OF PROVIDING RENTAL HOUSING

It is generally recognized that among the more unfortunate effects of municipal rent control programs is the loss of rental units from the housing market. *See* DeCanio, *Resolving the Housing Crisis*, "Rent Control

Voting Patterns, Popular Views and Group Interests," 301 (M. Bruce Johnson ed. 1982). Owners may withdraw their units for economic reasons, such as loss of a reasonable return, or they may withdraw them as an expression of protest against participation in an economic enterprise in which the benefits of the free market have been replaced with political decision making assigning economic benefits for political reasons. Frequently, as with Vicars, both reasons exist.

This Court has recognized the importance of protecting the freedoms of association and expression to oppose the imposition by initiative of rent control in the City of Berkeley. *Citizens Against Rent Control v. Berkeley,* 454 U.S. 290, 292, 300 (1981). First Amendment protections do not end with the election. Vicars should not be required to support with his time, energy, and abilities a political adventure which he opposes.

Notwithstanding the sensitive constitutional questions involved, municipalities have demonstrated extensive regulatory power to influence a decision to withdraw from the rental housing occupation by making it impossible or economically infeasible to transfer the assests to other productive uses. *See, e.g., Nash v. City of Santa Monica, supra* (refusal to grant a demolition permit). Occasionally, however, certain persons will wish to withdraw from the occupation of providing rental housing without proposing to modify the assets in any way subject to traditional land use regulation. Vicars is such a person. And for such a person as Vicars, even more draconian measures are required to lock him into the occupation of providing rental housing for a public purpose.

This Court in *Textile Workers v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965), stated:

> "A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent." *Id.* at 270.

In *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972), a case involving rent control, the District of Columbia Circuit indicated:

> "None of this is to say that the landlord may not go out of business entirely if he wishes to do so or that a jury is authorized to inspect his motives if he chooses to commit economic hara-kiri. There would be severe constitutional problems with a rule of law which required an entrepreneur to remain in business against his will." *Id.* at 867.

The California courts have not demonstrated the same concern as the federal courts over the constitutional problems associated with preventing a person from withdrawing from the occupation of providing rental housing, and this Court has not clearly defined the scope of the constitutional limitations which bind the ability of municipalities to force persons to remain in selected occupations.

In contrast, the right to *enter* a "common occupation" has been clearly enumerated by this Court as being a protected liberty interest under the Fourteenth Amendment. In *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), this Court explained the liberty interest by saying

> "[w]ithout doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations

> of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

For a person who is already engaged in one occupation, however, the ability "to engage in any of the [other] common occupations of life" is seriously hampered if he or she is prohibited from withdrawing from the current occupation. In Vicars' case, not only his time, abilities, and energy, but also a substantial block of personal resources are tied up in the occupation which the Superior Court is refusing to allow him to leave. If those commitments are not released, his options to pursue another course in life are drastically curtailed.

The California Supreme Court in *Nash, supra,* made light of this important fundamental liberty when it arose under different factual circumstances. The court stated:

> "Nash remains free to minimize his personal involvement by delegating responsibility for rent collection and maintenance to a property manager. He remains free under the ordinance to withhold rental units from the market as they become vacant. And, he remains free to sell his property and invest the proceeds elsewhere. The problem arises from the fact that Nash prefers to do none of these things, but to demolish the building and keep the land beneath as an investment." *Nash v. City of Santa Monica*, 37 Cal. 3d at 103.

Even if there were merit to the California Supreme Court's cavalier suggestion that "delegating responsibility" is the same as withdrawing from an occupation, this

case is not another *Nash* case. Vicars did not ask "to demolish the building." He is not asking to change the physical nature of the property to create a new investment in "the land beneath." Vicars is simply attempting to withdraw from the occupation of providing rental housing to persons designated by the city to receive preference for housing. Before the appellate court, Vicars asked to be allowed to show that the meager income allowed by the regulated rentals did not provide for hiring others in order to "minimize his personal involvement." Appendix F-2. The ruling below precluded Vicars from showing these facts or from showing that the sale of the property occupied by persons paying low, regulated rents was not a reasonable alternative. *Id.*

The constitutional issue presented in this case, however, does not turn on nitpicking reappraisals of the saleability of the property or the availability of surrogate property managers. Unlike Nash, Vicars does not deny that the municipality may preserve the property in its present state. Vicars simply objects to the requirement that he must personally engage in the occupation of making the property available for a public use on behalf of the city. Vicars does not question that the city can condemn his property and transfer it to another person who might willingly do the city's bidding to provide below market cost housing. *Hawaii Housing Authority v. Midkiff*, 467 U.S. —, 104 S. Ct. 2321 (1984). The constitution requires, however, that only the property and *not* the property owner may be put to the public use envisioned by the city.

II

THIS COURT SHOULD CLARIFY THAT A MUNICIPAL ORDINANCE WHICH REQUIRES THE INDIVIDUAL TO PERMIT THIRD PARTIES TO REMAIN ON HIS PROPERTY AGAINST HIS WILL CONSTITUTES A PHYSICAL INVASION OF THE PROPERTY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

In *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), this Court stated:

> "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, [citation omitted] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124.

In this case the Superior Court's order enforces the Berkeley ordinance which designates Vicars' tenants for special preference to remain on his property against his will. The effect of the Superior Court's order is to mandate the physical invasion of petitioner's premises. Under the rationale of *Penn Central Transportation Company v. City of New York*, a taking has occurred.

This Court has clearly established that a "physical invasion" can be by persons as well as things. The right to exclude others from one's property is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

More recently in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court stated:

> "[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause." *Id.* at 426.

In *Loretto*, the owner of an apartment building had brought a class action suit against Teleprompter Manhattan CATV Corporation. The owner alleged that the impact of legislation which allowed cables for cable television to be attached to the apartment building effected a taking of property for which compensation was required. This Court, holding that a taking had occurred stated:

> "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention." *Id.* at 426.

Under this analysis, a permanent physical invasion constitutes a per se taking. If the attachment of cables to an apartment building constitutes a taking, then requiring Vicars to allow third parties who hold under no contractual or property right to remain housed in his apartment buildings is also a taking. In both situations a physical invasion of the owner's property has occurred. Moreover, the physical invasion in this case is more extensive since, in contrast to the mere attachment of cables found unconstitutional in *Loretto*, here entire rental units are being physically occupied and the occupation consumes the property's total potential use.

The physical invasion in this case is permanent. Until the last tenant voluntarily vacates the property its potential uses are severely limited. In *Loretto* the Court observed that under the New York law:

> "So long as the property remains residential and a CATV company wishes to retain the installation, the landlord must permit it." *Id.* at 439.

The same legislation allowed the removal of the cables if the property was no longer being used as a rental building. Even though the cables could be removed at the moment the building ceased to be used for rental purposes, this Court nevertheless concluded that there was a permanent physical invasion. Under the analysis in *Loretto*, a physical invasion is permanent even though the landlord has the opportunity to prevent its continuance. This case goes beyond *Loretto* because Vicars is *not* given an opportunity to prevent the intrusion by discontinuing the present use. He is being required both to allow the physical invasion of his property and to continue the use with which the invasion is associated. Under the standards in *Loretto* a permanent physical invasion has occurred.

It is not a sufficient remedy to suggest that Vicars may retain the right to sell his property, for as this Court noted in *Loretto:*

> "[T]hough the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Id.* at 436.

This case would appear to be controlled by *Kaiser Aetna* and *Loretto*. Although the initial occupation of Vicars' property occurred with his consent, subject to the terms of the month-to-month tenancies, the Eleventh Circuit has found this distinction to be without force when the terms of the agreement are modified by the governmental action being challenged. *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1543 (11th Cir. 1985). This Court should clarify that physical invasions under a government mandate violate constitutional protections without regard to whether they occur without consent or exceed or continue beyond the scope of the original consent. This important issue which has not been settled by this Court is a complementary issue to that being considered in *MacDonald, supra*. Together the two cases provide the Court with the opportunity to clarify the law on regulatory takings arising from both prohibitory and mandatory regulation of property by municipal governments.

CONCLUSION

This case presents two significant constitutional issues which have not been, but should be, settled by this Court to provide guidance to municipalities and to individuals on the constitutional limits on municipal actions in two important policy areas. Through review of this case, the Court can clarify the standards governing the

use of the police power to require an individual both to devote his or her personal time, abilities, and energy to a public use and to permit the occupation of his or her private property for a public use.

For the foregoing reasons, the petition for certiorari should be granted.

DATED: November, 1985.

Of Counsel

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Respectfully submitted,

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APPENDIX A

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

San Francisco, California 94102

August 28, 1985

I have this day filed Order ———. Review denied. Mosk J. of the opinion that the petition should be granted. In re: No. A031460. Jon A. Vicars vs. Superior Court, Alameda.

Respectfully,
Clerk

877 8-82 4M - OSP

APPENDIX B

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FIVE

A031460

Alameda County
Superior Court No. 52930
(Filed July 8, 1985)

Jon A. Vicars,

Petitioner,

vs.

Superior Court, County of Alameda,

Respondent,

Ross Eppler, et al.,
Real parties in Interest.

BY THE COURT:

The petition for writ of certiorari is denied.

Dated July 8, 1985.

LOW, P.J.

APPENDIX C

AMENDED MINUTE Order

SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF ALAMEDA

Appellate Dept. ———

Date: 1-29-85 Ken Kawaichi Jerry K. Jue,
Hon. Benjamin Travis, Judge Deputy Clerk
Dawn Girard, Deputy Sheriff Reporter

Counsel appearing
for Plaintiff & APPELLANT

Counsel appearing
for Defendant & RESPONDENT

JON VICARS

Plaintiff,

vs.

ROSS EPPLER, ET AL,

Defendant.

NATURE OF PROCEEDINGS: ACTION No. 1359

Clarification having been requested of the previous minute order of the court, the following order is made in lieu of the order of 1-22-85:

The above entitled matter is called in open court. Oral argument is presented and the matter stands submitted. The following decision is rendered:

1. Rehearing having been granted on November 7, 1984, The court vacates the prior decision reversing the Municipal Court order.

2. No authority having been cited and none found, the objection that the same panel (Judge Schwartz, no longer on the Appellate Division and Judge Bartalini, on sick leave and recovering from an operation) should hear the rehearing as heard the original argument, the objection is overruled. (California Rules of Court, Rule 141).

3. The order of the Municipal Court sustaining the demurrer without leave to amend is affirmed.

4. Remittitur to issue.

Copies of this minute order mailed this date to:

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THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA
APPELLATE DEPARTMENT

JON VICARS,

Plaintiff and Appellant,

vs.

ROSS EPPLER, et al,

Defendant and Respondents.

REMITTITUR
CIVIL NO. 1359

On Appeal from the Municipal Court of the
Berkeley-Albany Judicial District

Municipal Court No. 52930
(Filed February 21, 1985)

And now this day, this cause having been called and having been heretofore submitted and taken under advisement and all and singular the law and premises having been fully considered comes now the Court and orders that the order of the Municipal Court sustaining the demurrer without leave to amend of the above-named Municipal Court in this action be and the same is hereby affirmed. Respondent to recover costs on appeal.

KAWAICHI, P. J. TRAVIS, J. GIRARD, J.

Appellant's Application for Certification to the Court of Appeal was filed January 31, 1985 and was denied February 21, 1985.

KAWAICHI, P. J. TRAVIS, J. GIRARD, J.

I Rene C. Davidson County Clerk of the Superior Court of the State of California in and for the County of

Alameda do hereby certify that the foregoing is a true and correct copy of an original judgment entered in the above entitled action on the 21st day of February, 1985 and now remaining of record in my office.

Witness my hand and the seal of the Court affixed at my office this 21st day of February 1985.

RENE C. DAVIDSON, County Clerk

By /s/ Geri Solberg, Deputy

APPENDIX D

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

APPELLATE DEPT. ——

Date Oct. 19, 1984 — Hon. Howard L. Schwartz, Judge; Andrea Carney, Deputy Clerk
Richard Bartalini, Deputy Sheriff — Reporter
Ken Kawaichi

Counsel appearing for Plaintiff

Counsel appearing for Defendant

JON VICARS,

Plaintiff & Appellant,

vs.

ROSS EPPLER,

Defendant & Respondent.

NATURE OF PROCEEDINGS: APPEAL

ACTION No. 1359
Municipal No. 52930

The above entitled matter having been submitted on October 19, 1984, comes now the court and makes the following order:

The inferred Judgment of Dismissal is reversed and the case is remanded to the Trial Court with instructions to set aside its Order Sustaining Demurrer with Prejudice, to overrule said Demurrer and conduct further proceedings not inconsistent with this opinion. Judge Schwartz and Judge Bartalini concurring. Judge Kawaichi concurring in the result of reverse and remand but not on the

constitutional grounds relied on by the majority. Dissenting opinion on file.

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IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA
APPELLATE DIVISION

No. 1359

JON A. VICARS,

Plaintiff, Appellant,

vs.

ROSS EPPLER, et al.,

Defendants, Respondents.

OPINION
(Filed October 19, 1984)

The technical issue on this appeal is whether the Trial Court erred in sustaining Defendant's demurrer with prejudice. The underlying legal issue is whether Berkeley's

rent control Ordinance, denominated Tenants Rights Amendments Act of 1982 and its forerunner, the Rent Stabilization and Eviction for Good Cause Ordinance, enacted June 3, 1980, prohibits Defendants' eviction through an unlawful detainer proceeding on the ground of Plaintiff landlord's desire to remove the premises from the rental housing market, a ground of eviction not recognized by the Ordinance.

This case arises under the following pertinent facts:

Plaintiff served defendants with a 30-day notice to vacate the premises, otherwise valid under CCP 1161.1, stating as the reason his desire to go out of the rental housing business. This occurred after plaintiff had been ordered by the Berkeley Rent Board under the said rent control ordinance to reduce his rents and to make substantial refunds to tenants. Defendant tenants (four of them) demurred to Plaintiff's Unlawful Detainer Complaint, filed after their failure to vacate, on the ground that the Berkeley ordinance did not provide for withdrawal of property from the rental housing market as a ground of eviction. Part B, Section 13.a prohibits recovery of possession by a landlord ". . . unless said landlord shows existence of one of the following grounds: . . .":

(1) Failure to pay rent

(2) Violation of material terms of the lease

(3) Tenant allowed or caused substantial damage

(4) Tenant refused to agree to a new rental agreement upon expiration of the old one.

(5) Tenant continues to destroy peace and quiet of other occupants

(6) Tenant has refused landlord access to the unit

(7) Landlord seeks in good faith to undertake substantial repairs necessary for compliance with law.

(8) Landlord seeks to remove the rental unit from the market for demolition, after obtaining permits

(9) Landlord seeks possession for his own use as a principle residence for himself, spouse, child or parent,

(10) Tenant fails to vacate under a temporary rental agreement after landlord sought to undertake repairs on tenant's original residence.

Section 13.b provides tenant with a defense in any action for possession of a rental unit if landlord fails to specify "good cause as listed" in Section 13.a.

Tenants' demurrers were sustained "with prejudice." We deem said Order sustaining demurrer the equivalent of a Judgment of Dismissal after an Order Sustaining demurrer without leave to amend. We find Plaintiff's voluntary dismissal and other procedural irregularities to be diminimus (sic) in light of the parties' stipulation at oral argument that the constitutional validity of Section 13.a as applied in this case was properly before us. In order to reduce needless multiple litigation it is desirable from the standpoint of the litigants and the administration of justice that the Court accept the stipulation and decide the essential issue on its merits. See *Conaway v Conaway*, (1963) 218 CA2d 427, 428 and *California State Employees Association vs. California*, (1973) 32 CA3d 103, 106.

A threshold constitutional issue herein is whether Berkeley may limit the substantive grounds for eviction in unlawful detainer actions in a manner which conflicts

with the State statutory scheme governing unlawful detainer proceedings as contained in *CCP* 1161, et sec. (sic), or to put it another way, whether state law preempts the field of grounds of unlawful detainer actions to the exclusion of local authority. This question has not been decided by case authority in California. *Birkenfeld v. City of Berkeley,* (1976) 17 C3d 129, held the Ordinance in effect at that time to be void by reason of a conflict between its procedural provisions for the obtaining of a certificate of eviction from the City and State law occupying the field of unlawful detainer procedure. At 136, 151-52. In dicta the Court appeared to state that it would uphold the City's attempt to restrict the substantive grounds for eviction as a reasonable means of enforcing rent ceilings. *Supra* at 136, 148, 152.

The constitutional validity of the Ordinance, including the preemption issue, is now before the California Supreme Court in *Fisher v City of Berkeley,* (1983) A010460, 1 Civ. 52332 filed October 24, 1983, hearing granted December 22, 1983.

Some states have invalidated eviction control local ordinances on the basis of state preemption. See *Burton v Hartford,* (1956) 127 A2d 251 (Conn.), *Miami Beach v Fleetwood Hotel, Inc.,* (1972) 261 So. 2d 801 (Fla.), *Huebeck v Baltimore,* (1954) 107 A2d 99 (Md.), *Marshal House, Inc. v Rent Review & Grievance Board,* (1970) 260 NE 2d 200 (Mass.), *Brunetti v New Milford,* (1975) 350 A2d 19 (N.J.), *F.T.B. Corp. v. Goodman,* (1949) 89 NE 2d 865 (N.Y.). In light of the current uncertainty of California law on the eviction grounds preemption issue we decline to decide this case on that ground.

A municipal ordinance, enacted within the legislative power of a municipality, is to be construed with the same effect as if it had been adopted by the Legislature, *Brown v. City of Berkeley,* (1976) 57 C3d 223, 231, and is therefore cloaked with a presumption of validity. It must be upheld "... unless its unconstitutionality clearly, positively and unmistakenly appears." *Hale v Morgan,* (1978) 22 C3d 388, 494.

Due Process

The Fourteenth Amendment of the *United States Constitution* and the due process clause (Art. I, § 7 (a); Art. I, § 15) of the *California Constitution* prohibit the deprivation of life, liberty and *property* without due process of law (emphasis added). Legislative acts which are oppressive, unreasonable or not reasonably related to the object of the legislation violate the due process clause. See *Hale v Morgan,* supra at 399.

Substantive due process, on the other hand, deals with protection from arbitrary legislative action even though the person whom it is sought to deprive of his life, liberty or property is afforded the fairest of procedural safeguards. In substantive law such deprivation is supportable only if the conduct from which the deprivation flows is prescribed by reasonable legislation reasonably applied, i.e. the law must not be unreasonable, arbitrary or capricious but must have a real and substantial relation to the object sought to be attained." (citations) *Gray v Whitmore,* (1971) 17 CA3d 1, 21.

Substantive due process is satisfied if the legislative regulation is ". . . neither arbitrary nor discriminatory."

Agricultural Labor Relations Bd. v Superior Court, (1976) 16 C3d 392, 410.

We accord the rent control ordinance on its face the validity to which it appears to be entitled under the dicta of *Birkenfeld v. City of Berkeley,* (1976) 17 C3d 129, 149, 152, in light of the 1982 procedural amendments. However, where a statute may be subject to both constitutional and unconstitutional applications, Courts evaluate the propriety of the sanction on a case-by-case basis. See *Hale v Morgan,* supra at 404.

The effect of upholding the validity of the application of the Ordinance in this case is to prevent Plaintiff from ceasing to rent residential property. Unless he choses (sic) to start the entire unlawful detainer procedure anew and to base his eviction on demolition of the building he is forced to continue as a residential landlord in Berkeley or to sell his property. Such an infringement on the customary and traditional rights of owners of real property, while not amounting to involuntary servitude under the Thirteenth Amendment of the *United States Constitution* or *Art I,* Sec. 18 of the *California Constitution,* constitutes an arbitrary, capricious and unreasonable infringement of Plaintiffs substantive due process rights as a property owner. Such infringement is not reasonably related to or necessary to effectuate the presumed valid objectives of the rent control statutory scheme.

While there is abundant authority upholding rent control ordinances in the United States and at least one state, Pennsylvania, has upheld the inclusion of eviction control provisions as a means of implementing valid rent ceiling or control provisions, See *Warren v Philadelphia,* (1955)

115 A 2d 218, no case authority has been found which upholds such an extreme restriction on the landlord's otherwise valid exercise of an owner's prerogative to offer or not offer his property for rent to tenants. *Birkenfeld,* supra, recognized the need for controlling the substantive grounds for eviction in order to assure compliance with maximum rent limits. 17 C3d at 152.

In this case it does not promote compliance with maximum rent controls to prohibit Plaintiff from removing his property from the residential housing market. If he were to demolish the building, as he may properly do under the Ordinance, or to convert the building to commercial, industrial or non-housing use, assuming he could do so in compliance with applicable zoning and other codes, the property would not be available to residential tenants nor covered by the ordinance at all. The result to the City and to residential tenants would be the same as that which Plaintiff is here attempting to accomplish, i.e., the removal of the property from the residential housing market. Any attempt to force the landlord in these circumstances to either sell his property, demolish it or remain in the business of renting residential property is, in our opinion, arbitrary, capricious and not reasonably related to a valid legislative purpose. The application of the ordinance in this case in a manner which prohibits plaintiff from withdrawing his property from the rental market violates Plaintiff's substantive due process rights under the United States and California Constitutions.

The Court, in *Birkenfeld,* supra, recognized by implication, the unreasonableness of the Ordinance in barring a landlord from withdrawing property from the market, in dicta at 148: ". . . and we assume for present purposes that the effect of the provision is simply to prohibit the

eviction of a tenant who is in good standing at the expiration of the tenancy *unless the premises are to be withdrawn from the rental housing market . . .*" (emphasis added)

Equal Protection

"'The Equal Protection Clause . . . den(ies) to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumscribed shall be treated alike.'" (citations) *Southern Ca. Assn. of Seventh Day Adventists v Franchise Tax Bd.,* (1975) 47 C3d 207, 213.

In this case Plaintiff is a member of the class of residential landlords. Yet he, as a result of the Trial Court's ruling, will be prohibited from withdrawing from the residential property rental business because he does not choose to demolish the building or devote it to some other non-residential use while other members of the class may go out of that same business if they demolish or remodel their building for non-residential use. Is there any rational distinction, necessary to promote the public policy behind the Ordinance, which justifies such disparate treatment of members of the same class? We think not.

The policy behind rent control is to maximize available rental housing at affordable rent. That policy is neither promoted nor discouraged by treating residential landlords who desire to withdraw their property from the housing market differently. If a landlord can remove his

property from the pool of units available for rent in the City by demolishing the building, why should not a landlord who desires to use his building for a purpose other than residential housing or to keep it vacant for that matter if he desires to do so, not be entitled to the same rights and treatment?

We perceive no reasonable differentiation fairly related to the object of the regulation which justifies the discrimination against plaintiff resulting from the Trial Court's application of the Ordinance to him in this case. See *Hays v Wood*, (1979 25 C3d 772, 786. Such discriminatory application is a violation of Equal Protection Clauses of the United States and California Constitutions.

It can be argued that to prohibit the landlord from evicting all tenants in order to devote his property to some non-residential rental use or to no use at all amounts to a physical occupation of his property and a "taking" by governmental authority without just compensation. See *Loretto v. Teleprompter Manhattan, CATV Corp.*, (1981) 458 US 419. While *Loretto* condemned the forced physical attachment of TV cables to the building, the forced continued occupancy of rental units by tenants is not in effect unlike a "physical taking" and is certainly a physical occupation of the premises.

> "In short, when the 'character of the governmental action,' *Penn. Central,* 438 US, at 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto,* supra, at 434-35.
>
> "Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space

by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." Id at 436.

While *Loretto* can be factually distinguished on the ground it involved a physical attachment of wires to the building, the effect of barring eviction in this case is to permit what may be permanent occupation of the building by tenants to the exclusion of traditional landlord's right to possession. Such an effect could amount to a "taking of property without just compensation under the Fifth and Fourteenth Amendments of the Constitution under *Loretto.*

It may be argued that it is necessary to prohibit plaintiff from withdrawing from the property rental business in order to prevent spurious eviction proceedings by landlords who fraudulently represent their true intentions in order to rerent to new tenants at rents violative of rent ceilings after regaining possession. The comprehensive Berkeley Ordinance provides civil remedies, including penalties as well as criminal sanctions for such conduct. Therefore, it is not necessary to violate Plaintiff's due process and equal protection rights, as set forth above, in order to safeguard the purposes of the Ordinance. See *Dobkins v. Hoffman,* (1983) 148 C3d 833, 837-838.

The inferred Judgment of Dismissal is reversed and the case is remanded to the Trial Court with instructions to set aside its Order Sustaining Demurrer with Prejudice, to overrule said Demurrer and conduct further proceedings not inconsistent with this opinion.

Dated: October 18, 1984

/s/ H. L. Schwartz
PRESIDING JUDGE

I Concur:

/s/ Richard Bartalini
Associate Judge

I concur in the result of reverse and remand but not on the constitutional grounds relied on by the majority. See dissenting opinion filed herewith.

/s/ Ken M. Kawaichi
Associate Judge

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA
APPELLATE DIVISION

No. 1359

JON A. VICARS,

Plaintiff, Appellant,

vs.

ROSS EPPLER, et al.,

Defendants, Respondents.

SEPARATE CONCURRING OPINION BY JUDGE KAWAICHI
(Filed October 19, 1984)

I concur in the result because the order of the Municipal Court is without legal meaning. The term, "with prejudice" indicates it is intended as a final order, but does not speak to the question of whether the demurrer was granted with or without leave to amend. See 3 Witkin, CALIFORNIA PROCEDURE, 2408 ff. Moreover, the voluntary dismissal by plaintiff, in place of a more conventional request that the Court either clarify or dismiss, operates to deny the plaintiff the right to dismiss

under C.C.P. 581(1). *Goldtree vs. Spreckels,* 135 Cal. 666 (1902); *Wells vs. Marina City Properties,* 29 Cal. 3d 781 (1981). Under these circumstances, the trial court must correct and clarify the record to present the constitutional issue in a ripe manner. Oral representations by the attorneys that the constitutional issue is properly presented cannot make it so.

Appellant contends that Berkeley's statutory scheme violates the Thirteenth Amendment's proscription of involuntary servitude (also, Cal.Const., Art.I,Sec.18). The Berkeley Act, however requires no personal services. A landlord can hire a manager or contract for services with one of the tenants. *Marcus Borwin vs. Feldman,* 256 U.S. 170 (1920). Further, a landlord may alter or terminate business. If Appellant wants to go out of the business of renting units, the property can be sold or occupied by the landlord, spouse, child or parent. Furthermore, the premises can be demolished after permits are obtained. Involuntary servitude in the accepted legal sense is not present.

Appellant also raises a due process argument. Apparently the argument is that the ordinance, in regulating the rental housing, constitutes a taking of property without due process.

Reduction of the value of the property is not alleged. Nor is any permanent invasion of the property alleged. The restrictions are not alleged to be, nor are they in fact, permanent in nature. See *Loretto vs. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419(1982). If Appellant seriously contends there is a partial or total condemnation of his property, he has adequate remedies for that taking outside the statutory scheme and outside this lawsuit.

Appellant contends that a city ordinance cannot create exclusive grounds for pleading a cause of action in unlawful detainer. Both sides have cited *Birkenfeld vs. City of Berkeley,* 17 Cal.3d 129(1976) to support their views on this issue. The legal effect of *Birkenfeld,* setting aside the dicta for the moment, was to liberalize the test for validating rent control measures. The old "emergency" doctrine was liberalized to a "compelling state interest" test. The language incorporated in the ordinance sufficiently sets forth a compelling state interest. See *Marcus Brown vs. Feldman,* 256 U.S. 170(1921); *Block vs. Hirsch,* 256 U.S. 135(1921); *Chastleton vs. Sinclair,* 264 U.S. 543 (1924). Appellant has neither cited cases nor raised arguments to support his interpretation of *Birkenfeld.*

The majority believes that the ordinance violates both the due process and equal protection clauses. I disagree.

I do not believe the ordinance is unduly restrictive. The legislative finding in the ordinance is that there is an emergency in the rental housing area in Berkeley. The regulation of unlawful detainers is merely the mechanism by which to accomplish the legitimate public purpose of providing adequate rental housing to the public. While some may disagree with the purpose of philosophy, the legislative decision is clearly supported within the ordinance and is neither arbitrary nor capricious. It is, in fact, as this case exemplifies, logically and reasonably related to the purpose intended.

The facts of this case indicate that the Plaintiff only arrived at his decision to "go out of the business of renting property" after he was denied a rent increase by the rent control board. It is suggested by Defendants that the defense of retaliatory eviction is appropriate and applicable

under these circumstances. Given the background, it appears that it is not a lack of due process being complained of, but an excess. It is not the deprivation of rights, but a disagreement with the legislative determination.

The majority, using as a class, "residential landlords", declares the class is deprived of equal protection because the Plaintiff must demolish the buildings or devote it to other nonresidential use. But the majority overlooks the simple fact that the Plaintiff can sell or trade. Moreover, the majority neither discusses nor distinguishes *Marcus Brown vs. Feldman,* 256 U.S. 170(1921), *Block vs. Hirsch,* 256 U.S. 135(1921) or *Chastleton vs. Sinclair,* 264 U.S. 543 (1924).

In conclusion, I think the majority has not marshalled facts or law to meet and overcome:

1. The presumption of validity. *Hale vs. Morgan,* 22 Cal.3d 388(1978).

2. The lack of any taking. *Loretto vs. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419(1982).

3. The specific legislative findings within the ordinance.

4. The alternatives available to the Plaintiff.

5. The weak factual and procedural posture of this case as a vehicle to meaningfully examine the constitutional issues.

Dated: October 18, 1984.

/s/ Ken M. Kawaichi
Judge of the Superior Court

APPENDIX E

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BERKELEY-ALBANY MUNICIPAL COURT,
STATE OF CALIFORNIA, COUNTY OF ALAMEDA

No. 52930

JON A. VICARS,

Plaintiff,

vs.

ROSS EPPLER, SUE BLAKE, PETER BENSON, HILARY J. JOHNSON, JULIA ANNE CATO, SUSAN STONE, WENDY MORRIS, FRANCESCA SUZIO, MARY ANN BRIDGET LAWLEY, BRIAN C. AKERS, does 1 through 50,

Defendants.

UNLAWFUL DETAINER

(Filed December 11, 1983)

FIRST CAUSE OF ACTION

1. Plaintiff, Jon A. Vicars alleges that he is an individual over the age of 18 years and the owner of the premises commonly known as 2431-2435 Jefferson Street, in the City of Berkeley, County of Alameda.

2. Defendants' tenancies are subject to the local rent control ordinance of the City of Berkeley, entitled City of Berkeley Rent Stabilization Ordinance of 1982.

Plaintiff has met all applicable requirements of the Ordinance.

3. The above named defendants and each of them are in possession of the premises commonly known as 2431-2435 Jefferson Street, Berkeley, California.

4. Plaintiff terminated the month to month tenancy of the above named defendants by means of service of thirty day notice to each of them on or about November 5, 6, 7, 1983, and that 30 day period, plus an additional 5 day period for mailing, in those cases of service by posting and mailing.

5. Said 30 day notice period has expired and the above named defendants and each of them, refuse to restore possession of the premises to the plaintiff.

6. The above named defendants and those fictitiously named, act in concert in occupying the premises and refusing to restore possession of the premises to the plaintiff.

SECOND CAUSE OF ACTION TO DEFENDANT ROSS EPPLER ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. On or about June 8, 1983 defendant Ross Eppler agreed to rent apartment "A" in the above premises for a month to month tenancy at a rent of $300./month payable monthly, due on the first of the month. This written agreement was made with the plaintiff. A copy of this agreement is attached and labeled Exhibit "A1".

3. On November 5, 1983 a 30 day notice to quit was served on the defendant in person. The period stated in that notice expired on December 6, 1983 and the defendant failed to comply with the requirements of that notice by

that date. A copy of the notice is attached and labeled Exhibit "A2".

4. The fair rental value of the premises is $10.00 per day.

THIRD CAUSE OF ACTION TO
DEFENDANT SUE BLAKE ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. During 1980, defendant Sue Blake agreed to rent apartment "B" in the above premises for a month to month tenancy at a rent of approximately $180.00 payable monthly, due on the first of the month. This agreement was orally made with the plaintiff's predecessor in interest.

3. In January 1983 the above agreement was modified, with the rent being $211.73 per month.

4. On November 5, 1983 a 30 day notice to quit was served on the defendant in person. The period stated in that notice expired on December 6, 1983 and the defendant failed to comply with the requirements of that notice by that date. A copy of the notice is attached and labeled Exhibit "B1".

5. The fair rental value of the premises is $7.06 per day.

FOURTH CAUSE OF ACTION TO
DEFENDANT PETER BENSON ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. During 1977 defendant Peter Benson agreed to rent apartment "C" in the above premises for a month to month tenancy at a rent of $145. payable monthly, due

on the first of the month. This agreement was orally made with the plaintiff's predecessor in interest.

3. In January 1983 the above agreement was modified to the rent being $189.32 per month.

4. On November 7, 1983 a 30 day notice to quit was served on the defendant by posting a copy on the premises that date and mailing a copy to the defendant at the premises on the same date. The period stated in that notice expired on December 13, 1983 and the defendant failed to comply with the requirements of that notice by that date. A copy of the notice is attached and labeled Exhibit "C1".

5. The fair rental value of the premises is $6.31 per day.

FIFTH CAUSE OF ACTION TO
DEFENDANT HILARY J. JOHNSON ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. On or about April 1, 1983 defendant Hilary J. Johnson agreed to rent apartment "D" in the above premises for a month to month tenancy at a rent of $300. payable monthly, due on the first of the month. This written agreement was made with the plaintiff. A copy of this agreement is attached and labeled Exhibit "D1".

3. In June, 1983 this agreement was modified with the rent being $240. per month.

4. On November 5, 1983 a 30 day notice to quit was served on the defendant in person. The period stated in that notice expired on December 6, 1983 and the defendant

failed to comply with the requirements of that notice by that date. A copy of the notice is attached and labeled Exhibit "D2".

5. The fair rental value of the premises is $8.00 per day.

SIXTH CAUSE OF ACTION TO
DEFENDANT JULIA ANNE CATO ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. During 1976 defendant Julia Anne Cato agreed to rent apartment "E" in the above premises for a month to month tenancy at a rent of $141.50 payable monthly, due on the first of the month. This agreement was orally made with the plaintiff's predecessor in interest.

3. In January 1983 the above agreement was modified with the rent being $188.84 per month.

4. On November 5, 1983 a 30 day notice to quit was served on the defendant in person. The period stated in that notice expired on December 6, 1983 and the defendant failed to comply with the requirements of that notice by that date. A copy of the notice is attached and labeled Exhibit "E1".

5. The fair rental value of the premises is $6.29 per day.

SEVENTH CAUSE OF ACTION TO
DEFENDANT SUSAN STONE ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. During 1976 defendant Susan Stone agreed to rent apartment "F" in the above premises for a month to month tenancy at a rent of $141.50 payable monthly, due on the first of the month. This agreement was orally made with the plaintiff's predecessor in interest.

3. In January 1983 the above agreement was modified with the rent being $186.74 per month.

4. On November 7, 1983 a 30 day notice to quit was served on the defendant by posting a copy on the premises on that date and mailing a copy to the defendant at the premises on the same date. The period stated in that notice expired on December 13, 1983 and the defendant failed to comply with the requirements of that notice. A copy of the notice is attached and labeled Exhibit "F1".

5. The fair rental value of the premises is $6.22 per day.

EIGHTH CAUSE OF ACTION TO DEFENDANT WENDY MORRIS ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. During 1981 defendant Wendy Morris agreed to rent apartment "G" in the above premises for a month to month tenancy at a rent of $225. payable monthly, due on the first of the month. This agreement was orally made with the plaintiff's predecessor in interest.

3. In January 1983 the above agreement was modified with the rent being $236.25 per month.

4. On November 7, 1983 a 30 day notice to quit was served on the defendant by posting a copy on the premises that date and mailing a copy to the defendant at the

premises on the same date. The period stated in that notice expired on December 13, 1983 and the defendant failed to comply with the requirements of that notice. A copy of the notice is attached and labeled Exhibit "G1".

5. The fair rental value of the premises is $7.87 per day.

NINTH CAUSE OF ACTION TO
DEFENDANT FRANCESCA SUZIO ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. During 1980 defendant Francesca Suzio agreed to rent apartment "H" in the above premises for a month to month tenancy at a rent of $250. payable monthly, due on the first of the month. This agreement was orally made with the plaintiff's predecessor in interest.

3. In January 1983 the above agreement was modified with the rent being $262.50 per month.

4. On November 6, 1983 a 30 day notice to quit was served on the defendant in person. The period stated in that notice expired on December 7, 1983 and the defendant failed to comply with the requirements of that notice by that date. A copy of the notice is attached and labeled Exhibit "H1".

5. The fair rental value of the premises is $8.75 per day.

TENTH CAUSE OF ACTION TO
DEFENDANT MARY ANN BRIDGET LAWLEY ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. During 1980 defendant Mary Ann Bridget Lawley agreed to rent apartment "J" in the above premises for a month to month tenancy at a rent of approximately $190.75 payable monthly, due on the first of the month. This agreement was orally made with the plaintiff's predecessor in interest.

3. In January 1983 the above agreement was modified with the rent being $200.78 per month.

4. On November 7, 1983 a 30 day notice to quit was served on the defendant by posting copy on the premises that date and mailing a copy to the defendant at the premises on the same date. The period stated in that notice expired on December 13, 1983 and the defendant failed to comply with the requirements of that notice. A copy of the notice is attached and labeled Exhibit "J1".

5. The fair rental value of the premises is $5.69 per day.

ELEVENTH CAUSE OF ACTION TO
DEFENDANT BRIAN D. ACKERS (sic) ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. On or about August 1982 defendant Brian D. Akers agreed to rent apartment "K" in the above premises for a month to month tenancy at a rent of $297. payable monthly, due the first of the month. This written agreement was made with the plaintiff.

3. In July 1983 the above agreement was modified with the rent being $300. per month.

4. On November 6, 1983 a 30 day notice to quit was served on the defendant in person. The period stated in

that notice expired on December 7, 1983 and the defendant failed to comply with the requirements of that notice by that date. A copy of the notice is attached and labeled Exhibit "K1".

5. The fair rental value of the premises is $10.00 per day.

PRAYER

1. Plaintiff demands possession from each of the defendants and these fictitiously named, under the provisions of California Civil Code, Section 1946; the provisions of United States Constitution, Amendments 13 and 14, under the provisions of the California Constitution, Article I, section 7(a), in order to go out of business.

2. Plaintiff remits to the jurisdictional limit of the court.

3. Plaintiff requests:

a. Possession of the premises.

b. Costs incurred in this proceeding.

c. Damages according to proof as to each cause of action.

d. Reasonable attorney fees as to the second, fifth and eleventh causes of action.

e. Forfeiture of the rental agreements with each of the defendants.

4. Such other relief as the court feels just and proper.

DATED: December 14, 1983

/s/ Michael C. Ciraolo
Attorney for Plaintiff

VERIFICATION

I am the plaintiff in this proceeding and have read this complaint. I declare under penalty of perjury, and upon information and belief, under the laws of the State of California that this complaint is true and correct.

DATED: December 14, 1983 at Berkeley, California.

/s/ Jon A. Vicars
Jon A. Vicars, Plaintiff

APPENDIX F

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA, APPELLATE DEPARTMENT

No. 1339

(BAMC #52930)

JON VICARS,

Plaintiff and Appellant,

vs.

ROSS EPPLER, et. al.,

Defendants and Respondents.

APPLICATION FOR CERTIFICATION TO THE COURT OF APPEAL

(Filed January 31, 1985)

TO: THE HONORABLE KEN M. KAWAICHI, PRESIDING JUDGE, AND THE HONORABLE ASSOCIATE JUDGES OF THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF ALAMEDA.

Appellant, JON VICARS, hereby applies to this court for certification of this case and its records to the Court of Appeal. This application is made pursuant to Rule 63 of the California Rules of Court. This application is made upon the grounds that questions of law need to be settled and in order to secure uniformity of decision.

ARGUMENT IN SUPPORT OF APPLICATION FOR CERTIFICATION

This court reversed itself from its previous ruling upon a petition for rehearing filed by the defendants and respondents, as well as by amicus, CITY OF BERKELEY. The principle case cited in the briefs for rehearing was the *Nash* case. (*Nash v. City of Santa Monica,* (1984) 37 C3d 97, 207 CR 285.)

As submitted in the attached declaration of counsel, the *Nash* case has been appealed to the United States Supreme Court. Therefore it is now being subject to further review.

Furthermore, the standards applied in the *Nash* case, i.e., rational relationship, were premised upon factual determinations after trial. Here, having had no trial, appellant is denied any evidence to determine if the *Nash* standards have been met. In *Nash* the Supreme Court mentioned various options available to Mr. Nash so that he would not be in an involuntary servitude situation. Those options were sale of the property or hiring a management company. Appellant has been denied the opportunity to present any evidence as to the saleability of the property or whether a management company would even be willing to handle the property.

Evidence as to secondary issues of sufficient income to pay a management company or meet mortgage payments which are related to the Supreme Court's rational relationship test could not be submitted.

This ruling creates a basic due process violation and denial of appellant's right to a hearing and presentation of evidence. The manner in which the demurrer has been

sustained under the Berkeley Rent Control Ordinance has caused this result.

It is submitted that these federal constitutional questions of involuntary servitude and denial of due process are important questions of law which need to be settled, and which remain without answer at this time.

Further, as this court is aware from previously submitted briefs and arguments in this case, there is now pending both before the First Appellate District of the Court of Appeal (number therein A028413 and Alameda County Superior Court #582948-6) a related civil rights matter. In *Vicars v. City of Berkeley, et al*, the Court of Appeal has issued its Alternate Writ of Mandate against the Alameda County Superior Court ordering it to allow Vicars to proceed if possible in accord with *Nash* (attached hereto as Exhibit "A").

Hearing therein on the subsequently filed demurrer to the alternative writ is now scheduled for March 5, 1985 (see Exhibit "B" attached hereto), before Division 5 of the Court of Appeal, First Appellate District.

There is the potential that the Court of Appeal may again reach a different decision from this court, as it did earlier on similar issues, and it is clear that there is no uniformity of decision at this time on the application of *Nash*. It is thus requested that this matter be certified to the Court of Appeal for further review.

Respectfully submitted,

Dated: 31 January 1985

/s/ Michael C. Ciraolo
Attorney for Appellant,
Jon Vicars

APPENDIX G

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

APPELLATE DEPT.

Date: Feb. 21, 1985

Hon. Ken Kawaichi, Judge; Geri Solberg, Deputy Clerk; Benjamin Travis, Deputy Sheriff; None Reporter; Dawn B. Girard.

JON VICARS,

Plaintiff and Appellant,

vs.

ROSS EPPLER, et al.,

Defendant and Respondents.

NATURE OF PROCEEDINGS:

APPELLANT'S APPLICATION FOR CERTIFICATION TO THE COURT OF APPEAL

ACTION NO. 1359

In the above entitled action, the Court having rendered judgment on January 29, 1985, and the Appellant having submitted an Application for Certification to the Court of Appeal, filed January 31, 1985, and the same having been taken under advisement and fully considered, comes now the Court and orders: Said application for Certification to the Court of Appeal is DENIED.

Copies of this minute order mailed this date to:

CIRAOLO & CIRAOLO
3306 Harrison Street
Oakland, CA 94611

Samuel E. Trosow
1950 Addison Street, #200
Berkeley, CA 94704

Roger Purdon
2259 Derby Street
Berkeley, CA 94705

City of Berkeley
Frederick Bray
City Attorney
2180 Milvia Street
Berkeley, CA 94704

APPENDIX H

BERKELEY RENT STABILIZATION AND EVICTION FOR GOOD CAUSE ORDINANCE

Section 13. GOOD CAUSE REQUIRED FOR EVICTION

a. No landlord shall be entitled to recover possession of a rental unit covered by the terms of this Ordinance unless said landlord shows the existence of one of the following grounds:

(1) The tenant has failed to pay rent to which the landlord is legally entitled pursuant to the lease or rental agreement and under the provisions of state or local law, unless the tenant has withheld rent pursuant to applicable law; and said failure has continued after service on the tenant of a written notice setting forth the amount of rent then due and requiring it to be paid, within a period, specified in the notice, of not less than three days.

(2) The tenant has continued, after written notice to cease, to substantially violate any of the material terms of the rental agreement, except the obligation to surrender possession on proper notice as required by law, and provided that such terms are reasonable and legal and have been accepted in writing by the tenant or made part of the rental agreement; and provided further that, where such terms have been accepted by the tenant or made part of the rental agreement subsequent to the initial creation of the tenancy, the landlord shall have first notified the tenant in writing that he or she need not accept such terms or agree to their being made part of the rental agreement.

(3) The tenant has willfully caused or allowed substantial damage to the premises beyond normal wear and

tear and has refused, after written notice, to pay the reasonable costs of repairing such damage and cease damaging said premises.

(4) The tenant has refused to agree to a new rental agreement upon expiration of a prior rental agreement, but only where the new rental agreement contains provisions that are substantially identical to the prior rental agreement, and is not inconsistent with local, state and federal laws.

(5) The tenant has continued, following written notice to cease, to be so disorderly as to destroy the peace and quiet of other tenants or occupants of the premises.

(6) The tenant has, after written notice to cease, refused the landlord access to the unit as required by state or local law.

(7) (A) The landlord, after having obtained all necessary permits from the City of Berkeley, seeks in good faith to undertake substantial repairs which are necessary to bring the property into compliance with applicable codes and laws affecting the health and safety of tenants of the building or where necessary under an outstanding notice of code violations affecting the health and safety of tenants of the building, and where such repairs cannot be completed while the tenant resides on the premises.

(B) Where such repairs can be completed in a period of sixty or fewer days, and the tenant, within thirty days after the service of a notice of termination of his or her tenancy, agrees in writing to vacate the premises during the period required to complete the repairs at no charge to the landlord, other than abatement of the obligation to

pay rent for the premises during the period required to complete the repairs, the landlord may not recover possession pursuant to this Subsection 13.a.(7) unless the tenant shall fail or refuse to vacate the premises in accordance with such agreement.

(C) Where the landlord owns any other residential rental units in the City of Berkeley, and any such unit is vacant and available at the time of service of the written notice terminating the tenancy, or at any time thereafter until the earlier of the tenant's vacating the premises or the entry of a judgment by a court of competent jurisdiction awarding possession of the premises to the landlord, the landlord shall, as a condition of obtaining possession pursuant to this Subsection 13.a.(7), notify tenant in writing of the existence and address of each such vacant rental unit and offer tenant the right, at the tenant's option:

(1) to enter into a rental agreement (to be designated as a "temporary rental agreement") on any available rental unit which the tenant may choose, at a rent not to exceed the lesser of the lawful rent which may be charged for such available rental unit or the lawful rent in effect, at the time of the notice of termination of tenancy, on the unit being vacated, said rental agreement to be for a term of the lesser of ninety days or until completion of repairs on the rental unit being vacated by tenant, or;

(2) to enter into a new rental agreement or lease for such available rental unit at a rent not to exceed the lawful rent which may be charged for such available rental unit.

(D) Where the landlord recovers possession under this subsection 13.a.(7), the tenant must be given the right of first refusal to re-occupy the unit upon completion of the required work. In the event landlord files an application for an individual rent adjustment within six months following the completion of the work, the tenant shall be a party to such proceeding the same as if he or she were still in possession, unless the landlord shall submit, with such application, a written waiver by the tenant of his or her right to re-occupy the premises pursuant to this subsection.

(8) The landlord, after having obtained all necessary permits from the City of Berkeley, seeks in good faith to recover possession of the rental unit, in order to remove the rental unit from the market by demolition.

(9) The landlord seeks in good faith to recover possession for his or her own use or and occupancy as his or her principal residence, or for the use and occupancy as a principal residence by the landlord's spouse or by the landlord's child-or parent. For the purposes of this subsection 13.a.(9), the term landlord shall be defined as the owner of record, as of the time of giving of a notice terminating the tenant's tenancy, and at all times thereafter to and including the earlier of the tenant's surrender of possession of the premises or the entry of a judgment of a court of competent jurisdiction awarding possession of the premises to the landlord, holding at least a 50% interest in the property and shall not include a lessor, sublessor, or agent of the owner of record. The landlord may not recover possession under this subsection 13.a.(9) if a comparable unit was, at the time of the landlord's decision to seek to recover possession of the

rental unit, already vacant and available in the property, or if a comparable unit thereafter becomes vacant in the property at any time until the earlier of the tenant's surrender of possession of the premises or the entry of a judgment of a court of competent jurisdiction awarding possession of the premises to the landlord. In an action by or against the tenant, evidence that a comparable unit was vacant and available in the property within ninety days prior to the date of a notice terminating the tenant's tenancy shall create a presumption that such unit was vacant and available at the time of the landlord's decision to seek to recover possession of the premises. "Presumption" means that the Court must find the existence of the presumed fact unless and until the contrary is proven by a preponderance of the evidence.

(10) A landlord or lessor seeks in good faith to recover possession of the rental unit for his/her occupancy as a principal residence, where the landlord or lessor has previously occupied the rental unit as his/her principal residence and has the right to recover possession of the unit for his/her occupancy as a principal residence under an existing rental agreement with the current tenants.

(11) The tenant fails to vacate a rental unit occupied under the terms of a temporary rental agreement entered into pursuant to the provisions of subsection 13.a.(7)(C), following expiration of the term of said temporary rental agreement, and following written notice of the availability of tenant's previous rental unit for re-occupancy by tenant (if the term of the rental agreement has expired by reason of the completion of repairs on the old rental unit), or of written notice to quit (if the term

of the rental agreement has expired by reason of the expiration of a period of ninety days).

b. A landlord's failure to specify good cause as listed above in subsections 1 through 11 of Section 13.a. in the notice of termination or the notice to quit and in the complaint for possession shall be a defense to any action for possession of a rental unit covered by the terms of this Ordinance.

c. In any action to recover possession of a rental unit covered by the terms of this Ordinance, except an action to recover possession under subsection 13.a.(7), 13.a.(8) or 13.a.(11), a landlord shall allege, as to each rental unit on the property, substantial compliance as of the date of the notice of termination or notice to quit and as of the date of the commencement of the action for possession with the implied warranty of habitability and compliance as of the date of the notice of termination or notice to quit and as of the date of the commencement of the action for possession with Sections 10 (Rent Ceiling) and 8 (Rent Registration) of this Ordinance.

d. The landlord shall file with the Board a copy of any notice of termination, notice to quit, and/or summons and complaint, within ten (10) days after the tenant has been served with such notice or summons and complaint.